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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

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No. 953

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JAMES M. CRUME,

*Petitioner,*

*vs.*

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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**BRIEF AND ARGUMENT OF RESPONDENT, PACIFIC  
MUTUAL LIFE INSURANCE COMPANY, IN OPPO-  
SITION TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT.**

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ORVILLE J. TAYLOR,

WHITNEY CAMPBELL,

*Counsel for Respondent.*



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*To the Honorable, the Chief Justice, and the Associate  
Justices, of the Supreme Court of the United States:*

Pacific Mutual Life Insurance Company, respondent to the petition of James M. Crume, petitioner herein, for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in this matter, opposes the granting of the writ; and in support of such opposition, we respectfully submit the following brief and argument in its behalf.

### **Opinions Below.**

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in this cause is reported in 140 F. (2d) at page 182. It is also set forth in the Transcript at pages 172 to 177.

Judge Barnes of the District Court of the United States for the Northern District of Illinois, Eastern Division, filed a memorandum opinion which is set forth in the Transcript at page 131.

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### **Statement of Facts.**

Since neither the petition nor petitioner's brief contains a complete and concise statement of the facts of the case, we believe it desirable to set forth a brief outline of the important facts.

The claim in this case was one of copyright infringement. The case was disposed of in the District Court on the pleadings. The petitioner filed a complaint together with exhibits which consisted of his four copyrighted pamphlets and copies of two alleged infringing publications. The respondent filed a motion to dismiss which was sustained. Petitioner's motion for a new trial was denied. On appeal to the Circuit Court of Appeals for the Seventh Circuit the orders of the District Court sustaining respondent's motion to dismiss and denying petitioner's motion for a new trial were affirmed.

The complaint (Tr. 2 to 6) alleged that the petitioner is the author of four books, and that he caused each of said books to be copyrighted in conformity with the copyright statute. The titles of petitioner's books and the respective

dates on which petitioner caused them to be copyrighted, are set forth in the complaint as follows (Tr. 3):

Title	Date
Illinois Life Insurance Company Mutualization and Readjustment Plan	February 3, 1933
Detroit Life Insurance Company Mutualization and Readjustment Plan	July 10, 1935
Federal Union Life Insurance Company Tentative Mutualization and Readjustment Plan	August 22, 1936
Mutualization and Readjustment Plan Agreement	August 17, 1936

The complaint further alleged that the petitioner notified or caused the respondent to be notified in writing of its infringement of petitioner's rights as copyright proprietor (Tr. 4).

The complaint alleged that the respondent caused to be published, printed and distributed a certain instrument called a "Rehabilitation and Reinsurance Agreement," dated as of July 22, 1936, whereby the respondent appropriated and pirated many clauses, paragraphs and parts of the books upon which petitioner had previously secured copyrights. It alleged that respondent printed or caused to be printed copies of said agreement and circulated or caused the same to be circulated throughout the United States after petitioner's last copyright had been obtained. It alleged that the first infringement was committed by the respondent in causing said "Rehabilitation and Reinsurance Agreement" to be published in the August, 1936 issue of respondent's trade journal called "Pacific Mutual News," and that respondent distributed a large number of copies of said issue after petitioner's last copyright had been secured (Tr. 4).

The complaint alleged that the respondent also printed and distributed additional infringing copies of said in-

fringing "Rehabilitation and Reinsurance Agreement" by publishing the same in pamphlet form, redating the same as of December 4, 1936, and caused a large number of copies of said pamphlet to be distributed throughout the United States (Tr. 4).

The complaint further alleged on information and belief that respondent published, printed and distributed not less than 750,000 copies of said "Rehabilitation and Reinsurance Agreement" on and after the date of petitioner's latest copyright, that respondent had on hand a great number of copies of said agreement, that respondent intended to and unless restrained by the court would continue to distribute copies of said agreement, and that each copy so printed and distributed by the respondent infringed each of petitioner's four copyrights (Tr. 4, 5).

The complaint prayed that the court enjoin the respondent from further distributing any copies of the "Rehabilitation and Reinsurance Agreement," that respondent be required to deliver up all copies on hand to be impounded during the pendency of the cause, that an accounting be taken and the number of copies published, printed and distributed by the respondent be ascertained and determined and that judgment be entered against the respondent for the statutory sum of One Dollar per copy for each copy found to have been made by the respondent, and at the statutory rate for each of the four copyrights found to be infringed by the respondent (Tr. 5, 6).

A confusion in the complaint between an earlier plan for the reorganization and rehabilitation of The Pacific Mutual Life Insurance Company of California which was not adopted in the statutory proceeding in California and a later plan of reorganization and rehabilitation which was adopted is clarified by a stipulation of the parties (Tr. 139, 140).

In accordance with Copyright Rule No. 2 of this court, the petitioner filed as exhibits to his complaint a copy of each of his four copyrighted works (Tr. 36-129) and copies of two alleged infringing works (Tr. 7-35; 140-164). These required exhibits to the complaint were, of course, a part of the complaint for the purpose of the motion to dismiss.

An examination of petitioner's four pamphlets (Tr. 36-129) discloses that each of them is a plan, or an outline of a plan, for the reorganization of an insolvent life insurance company through mutualization and readjustment of liabilities. From the content of one of petitioner's pamphlets (Illinois Life Insurance Company Mutualization and Readjustment Plan) it appears that it was prepared for a policyholders' protective committee (Tr. 61, 62).

Some of the important facts which appear from the alleged infringing publications are:

- (a) that they were agreements between the respondent corporation and the Insurance Commissioner of the State of California, acting as statutory conservator of a predecessor company (Tr. 7, 8, 145, 146);
- (b) that they were promulgated by the Insurance Commissioner of the State of California, acting as statutory conservator of a predecessor company, for the purpose of reorganizing and rehabilitating the business and assets of a predecessor company (Tr. 7-35, 145-164);
- (c) that they were prepared for submission to, and approval by, the Superior Court of California, in a proceeding there pending pursuant to the California Insurance Code (Tr. 8, 34, 35, 141, 142);
- (d) that they were, in substance, plans providing for the organization of the respondent corporation (Tr. 7-35; 145-164).

Respondent filed its motion (Tr. 129, 130) to dismiss petitioner's action on the following grounds:

- (a) that the complaint, together with the exhibits, fails to state a claim upon which relief can be granted;
- (b) that the alleged infringing works are not a copy, in whole or in part, of any of the works which petitioner registered in the Copyright Office;
- (c) that each of the works which petitioner registered in the Copyright Office is nothing more than a proposed plan, or the outline of a proposed plan, for the reorganization of an insurance company, and is not copyrightable;
- (d) that each of the works which petitioner registered in the Copyright Office does nothing more than set forth a plan which is common property and is, therefore, not copyrightable;
- (e) that each of the works which petitioner registered in the Copyright Office does nothing more than set forth matters in the public domain, and is, therefore, not copyrightable;
- (f) that none of the works which petitioner registered in the Copyright Office is original with the plaintiff and, therefore, none of them is copyrightable;
- (g) that two of petitioner's four works were registered in the Copyright Office subsequent to the publication of the alleged infringing works;
- (h) that petitioner's cause of action, if any, does not lie against the respondent but lies against Samuel L. Carpenter, Jr., who, as Insurance Commissioner of the State of California in the year 1936, promulgated and published the alleged infringing works pursuant to the provisions of the California Insurance Code and pursuant to orders of the Superior Court of California in and for the County of Los Angeles.

Respondent's motion also asserted that petitioner's cause of action, if any, was barred by laches (Tr. 130).

The petition filed in this court by the petitioner states (page 2): "Many points over which there was controversy such as the matter of laches, what was and was not in the

public domain, and others, were abandoned in the Circuit Court of Appeals by respondent in its oral argument.” We are completely unable to understand or explain that statement, as the respondent has at no time abandoned any of the points made by it in its motion to dismiss.

#### SUMMARY OF ARGUMENT.

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The question decided by the Circuit Court of Appeals in this case was whether the alleged infringing works do in fact infringe upon any rights which the petitioner may have obtained by registering his four pamphlets in the Copyright Office.

Both the District Court and the Circuit Court of Appeals found that there had been no substantial copying or use of petitioner's means of expression and, accordingly, no infringement had occurred.

A comparison of the exhibits in this case establishes, without more, the correctness of the decision of the Circuit Court of Appeals denying petitioner's claim of infringement, and the decision is not in conflict with the decision of any other circuit court of appeals on the same matter.

ARGUMENT.

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## I.

## Introductory Statement.

Petitioner states that the question upon which he seeks a review by this court is (Petitioner's petition, p. 2):

"Conceding that the public had the right to take every step and following every idea and every suggestion promulgated in petitioner's copyrighted works, did respondent thereby have the right to copy, publish, republish, and pirate petitioner's copyrighted books?"

That is a wholly gratuitous statement of the question. It assumes copying and infringement and utterly disregards the basic issue in the case and the necessary prior question which is: Was there any copying or imitating constituting infringement?

The right to copy cannot be in issue unless there is some evidence of copying. In this case there is none.

The question presented by the petition is more accurately stated on page 14 of petitioner's brief, in the following manner:

"The really important question presented to the court, is whether or not respondent has infringed petitioner's copyrights."

Both the District Court and the Circuit Court of Appeals found that there was no infringement.

## II.

**A Plan, System or Idea Is Not Copyrightable.**

While the petitioner professes to admit that he cannot have a copyright in a plan, system or idea (Petitioner's brief, p. 24), he repeatedly asserts the claim that he is the originator of a method of reorganizing life insurance companies and endeavors to attach to that claim some right under the copyright laws (Petitioner's brief, pp. 2, 6-8). It is appropriate, therefore, to review briefly the authorities on that subject.

The method of reorganizing life insurance companies by mutualization and readjustment of liabilities is, in itself, nothing more than an intellectual concept. It is a plan, system, or idea, and, as such, is not subject to copyright.

In the case of *Baker v. Selden*, 101 U. S. 99, this court held that a copyright upon a book explaining a system of bookkeeping did not protect the copyright owner from the use of the system by another.

In *Dorsey v. Old Surety Life Ins. Co.*, 98 F. (2d) 872 (C. C. A. 10th) the court held that copyrights obtained by the plaintiff upon three forms of life insurance policies could not restrict the right of the defendant to use the plans of insurance embraced in the copyrighted policies.

In *Burk v. Johnson*, 146 Fed. 209 (C. C. A. 8th), it was held that the copyright of a pamphlet containing articles of association and by-laws of a mutual burial association did not protect the system, as a system, so as to confer on the person owning the copyright the exclusive right to organize associations under the plan.

In *Long v. Jordan*, 29 F. Supp. 287, it was held that a copyright expounding a system of old age pensions could not prevent the use of the system by others.

In *Affiliated Enterprises, Inc. v. Gruber*, 86 F. (2d) 958 (C. C. A. 1st), it was held that a "bank night" system which plaintiff originated and furnished to motion picture theatres by licenses could not be copyrighted.

Under these authorities, even if the petitioner were the originator of the plan or idea of reorganizing life insurance companies by mutualization and readjustment of liabilities, the copyright laws would give him no exclusive right in that plan or idea.

### III.

#### **The Reorganization Devices of Mutualization and Re-adjustment of Liabilities Are Matters Within the Public Domain.**

While the fact that a plan, system or idea is not subject to copyright is a complete answer to any contention that petitioner has a copyright on the reorganization method contained in his pamphlets, there is another equally compelling answer, namely, that neither of the devices used in his pamphlets is original with the petitioner and that both are matters in the public domain.

The principle that matters in the public domain are not copyrightable does not require discussion (*Becker v. Loew's, Inc.*, 133 F. (2d) 889, 891, C. C. A. 7th; *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, 24, C. C. A. 9th).

It is apparent from reported cases alone, that the reorganization device of mutualization and the reorganization device of liability readjustment did not have their origin with petitioner's pamphlets.

An early case involving the mutualization of a stock life insurance company is the case of *Royal Trust Co. v. Equitable Life Assurance Society of the United States*,

247 Fed. 437, decided by the Circuit Court of Appeals for the Second Circuit in 1917. In that case the court pointed out that the statutes of New York have authorized the conversion of stock life insurance corporations into mutual corporations since 1906 (247 Fed. at page 439).

The numerous cases involving the reorganization of the National Surety Company by a readjustment of liabilities show clearly that the device of reorganizing insurance companies by that method preceded petitioner's pamphlets. *In re National Surety Co.*, 268 N. Y. S. 88 (1933), affirmed without opinion under the name of *People by Van Schaick v. National Surety Co.*, 264 N. Y. 473, 191 N. E. 521; *National Surety Corporation v. Nantz*, 262 Ky. 413, 90 S. W. (2d) 385; *Thrower v. Kistler*, 14 F. Supp. 217.

To support a valid copyright a work must be original. The reorganization devices of mutualization and readjustment of liabilities are a part of the fund of knowledge of mankind and are common property. As such, they are within the public domain and cannot, either separately or in combination, be appropriated to a private domain by the use of the copyright law.

#### IV.

#### **There Has Been No Infringement Because There Has Been No Copying.**

Assuming that there is some zone within which the petitioner obtained exclusive rights under the copyright law, the most that the petitioner could have procured by registering his pamphlets would be an exclusive right in his original means of expression. Even on that assumption, there has been no infringement of petitioner's rights because there has been no copying.

It is a fundamental of copyright law that there can be no infringement unless there has been copying, in whole or in part, of the copyrighted work (*Becker v. Loew's, Inc.*, 133 F. (2d) 889, 892, C. C. A. 7th).

There could be infringement, of course, without literal copying of the whole of petitioner's work. But there can be no infringement unless there has been some substantial imitation, duplication, plagiarism or reproduction (Admurr, Copyright Law and Practice, 1936, pp. 656-682).

In this case a comparison of the exhibits demonstrates that there is no similarity of language or form between either of the alleged infringing works and any of the petitioner's four pamphlets.

On this fundamental point of showing some copying—or even similarity—by a comparison of the exhibits, petitioner's brief does nothing more than set forth six pages of parallel columns (Petitioner's brief, pp. 17-22), without comment or discussion except for the gratuitous introductory conclusion that respondent lifted and pirated verbatim much material and many words and phrases from petitioner's copyrighted books (Petitioner's brief, p. 16).

From an examination of this material in column form, even as presented in petitioner's brief, it is plain that there is no similarity or resemblance which approaches copying. But it is particularly significant that in his efforts to show a similarity, and for the asserted purpose of "easier comparison" (Petitioner's brief, p. 16), petitioner has so tortured some of his illustrative paragraphs by omissions and deletions that the excerpts set forth in his brief bear little or no resemblance to the actual text contained in the transcript and record.

Petitioner's desperation is made evident by an examination of the *full* text of the first and second illustrative excerpts used in petitioner's brief (Petitioner's brief, p. 17). The full text of the first illustrative excerpts is:

**Full Text of First Illustrative Excerpts Used in  
Petitioner's Brief.**

*From*  
*Petitioner's Pamphlet*  
(Tr. 109)

"Receiver, in consideration of the aforesaid reinsurance and assumption, and in consideration of all the mutual covenants and agreements herein contained, agrees to, and does hereby, sell, transfer, assign, set over and convey, and will, as soon as the necessary steps can be practicably taken, deliver to the Company all the properties of Peoria, real, personal and mixed (including stock of corporations owned by Peoria and properties held in the name of others for Peoria) including all its rights and choses in action, all its due, uncollected and deferred premiums, all of its policy loans, premium lien notes and all other notes, whether given for the first or second or subsequent years' premium, and whether payable to Peoria, its agents, or otherwise, and all other policy indebtedness of any nature whatsoever; bills and accounts receivable, agents' debit balances, premiums to become due in the future, interest and rents due and secured, surety bonds, fire and casualty insurance policies, stocks, bonds, furniture and fixtures, stationery, supplies, contracts of every nature and description; all of its defenses against claims which may be set up against it, or which may arise out of the aforesaid reinsurance or assumption, or out of any transaction connected with any part of the business

*From*  
*Alleged Infringing Work*  
(Tr. 9)

"The Conservator agrees, by appropriate instrument of conveyance, to sell, assign, convey, release, transfer, set over, and deliver, to the New Company, the properties of the Old Company; and to execute any and all further documents or instruments as may be reasonably necessary to effectuate and confirm the title of the New Company thereto."

*From*  
*Petitioner's Pamphlet*  
 (Tr. 109)

*From*  
*Alleged Infringing Work*  
 (Tr. 9)

of Peoria; all records, except the stock books, minutes of the stockholders' and directors' meetings (but the New Company shall have access to same) all leases documents, files, cash on hand and/or on deposit, and all other assets of every nature, kind and description, tangible and intangible, whether herein referred to or not, whereof said Peoria and/or Receiver in that capacity, may be possessed or whereunder it and/or they may have rights or claims, except stock owned or held in any failed banking institution, and except such assets as may be withheld by order of the Court for special distribution to policyholders or contract holders of Peoria dissenting to this agreement, or to other creditors of Peoria."

From a comparison of the full text of the two excerpts above quoted it is readily apparent that their language is similar only in the fact that they contain in common several words customarily found in legal documents. Apparently petitioner bases his charge of appropriation upon the use of several basic legal terms such as "agrees," "transfer," and "properties".

Petitioner's second illustration of verbatim pirating is likewise tortured by omissions and deletions (Petitioner's brief, p. 17). The full text of the second illustrative excerpts is:

**Full Text of Second Illustrative Excerpts Used in  
Petitioner's Brief.**

*From*

*Petitioner's Pamphlet*  
(Tr. 112, 113)

"Immediately upon the execution of this agreement out of the assets of Peoria there shall forthwith be paid and transferred to the Company, out of the property now in the hands of the Receiver cash and/or securities, and/or mortgages in the amount of Two Hundred Thousand Dollars (\$200,000.00) for the purpose of providing the Company with a guarantee capital as required by the laws and statutes of the State of Illinois for the operation of a legal reserve mutual life insurance company, also having authority to transact the business of accident and health insurance."

*From*

*Alleged Infringing Work*  
(Tr. 12, 13)

"The New Company agrees to establish a separate department for Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator (other than the Three Million Dollars (\$3,000,000) transferred to the New Company for its capital stock) in the ratio in which assets appearing on the books of the Life Department of the Old Company were credited to the Participating Life Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the operations of the business of the Old Company by the Conservator, including the writing of the new participating life insurance by the New Company, and except assets of the book value of One Million, Seven Hundred Ninety-two Thousand, One Hundred Eighteen Dollars and Ninety-seven Cents (\$1,792,118.97) transferred by the Conservator to the Accident and Health Department.

"The said Three Million Dollars (\$3,000,000) transferred to the New Company for its capital stock constitutes and shall constitute the capital and paid-in surplus of the New Company; and neither the Particip-

*From*  
*Petitioner's Pamphlet*  
 (Tr. 112, 113)

*From*  
*Alleged Infringing Work*  
 (Tr. 12, 13)

parting Department nor the  
 holders, present or future, of  
 participating policies shall have  
 any right, claim, or interest  
 therein prior to other Depart-  
 ments or their policy holders."

Comparison of the second illustrative excerpts above quoted likewise reveals no copying and no similarity of means of expression unless copying and similarity can be found in the mutual use of the dollar sign.

Such are the petitioner's first two examples of copying and pirating. It would serve no useful purpose to further analyze or comment upon the examples which the petitioner sets forth. It is obvious that the only substantial similarity between any of the parallel excerpts in petitioner's brief is that, in some instances, they deal with similar subject matter. Their means of expression are completely dissimilar.

## V.

**Any Remote Similarity Between Petitioner's Pamphlets and the Alleged Infringing Publications Results From Common Subjects and Common Sources Within the Public Domain of Common Knowledge and Common Property.**

There are, of course, some similarities between the alleged infringing works and petitioner's pamphlets. But in the same sense, and to the same extent, there are similarities between any two plans which provide for the reorganization of an insolvent life insurance company. Every such plan will contain provisions relating to many of the following subjects: transfer of assets, mutualization, reinsurance, assumption of policies, readjustment of liability

ties, payment of claims, reinstatement, moratorium, and agents' commissions.

In the treatment of this common subject matter every draftsman necessarily draws on common sources. The common sources in this case are the hundreds of plans of reorganization which have been prepared and proposed since it was first necessary to reorganize an insurance company and since it was first necessary to reorganize any corporation.

The similarity between a copyrighted work and an alleged infringing work which arises from common subject matter and common sources does not, to any degree, support a claim of infringement. (*Affiliated Enterprises, Inc. v. Gruber*, 86 F. (2d) 958, 961, C. C. A. 1st; *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, 17, C. C. A. 9th.)

The exhibits in this case are legal documents, and the rule as to legal documents is even more stringent than the general rule. The very necessity for similar documents in similar legal situations requires a plaintiff who claims infringement of a copyrighted legal document to establish that a very material portion of his work has been literally and exactly copied.

In *Dorsey v. Old Surety Life Insurance Co.*, 98 F. (2d) 872 (C. C. A. 10th), affirming a decree of dismissal in a case brought upon copyrighted insurance policies, the court said (p. 874):

"A copyright upon a form of contractual provision should not be construed so as to impinge upon the natural right of persons to make contracts containing the same contractual provisions and creating like contractual rights and obligations, and similarity of expression should not be held to constitute infringement in such cases. Necessarily, where the same contractual provision is to be expressed there will be similarity of language. To constitute infringement in such cases a showing of appropriation in the exact form or substantially so of the copyrighted material should be required."

To confer rights of any greater scope upon one who copyrights legal documents would be unthinkable.

Whatever similarities there may be between the alleged infringing works and petitioner's pamphlets are remote, indeed, and arise only in the common subject matter with which the documents deal and the common sources which all draftsmen of legal documents draw upon.

Petitioner's rights in a copyrighted legal document could be invaded only by substantial and exact copying. In this case the alleged infringing works are so unlike petitioner's pamphlets that a comparison leads only to the conclusion that if the draftsmen of the alleged infringing works ever saw any of the petitioner's pamphlets they completely shunned them.

## VI.

### **Petitioner's Cause of Action, If Any, Is Not Against the Respondent.**

The alleged infringing publications were, in fact, plans of reorganization and rehabilitation for the business and assets of a company which was the predecessor of the respondent (Tr. 7-35; 145-164). It is apparent from these exhibits that both plans were promulgated by the Insurance Commissioner of California acting as statutory conservator of the predecessor company, and that both plans were prepared for submission to, and were subject to the approval of, the Superior Court of California.

The Rehabilitation and Reinsurance Agreement dated July 22, 1936 (Tr. 7-35) is the plan which was approved in the California proceeding (Tr. 139). The respondent in this case is the product and not the author of that plan.

The proceedings taken before the Superior Court of California, including the approval of the Rehabilitation

and Reinsurance Agreement, were reviewed and affirmed by the Supreme Court of California and by this court. *Carpenter v. The Pacific Mutual Life Insurance Company of California*, 10 Cal. (2d) 307, 74 P. (2d) 761; *Neblett v. Carpenter*, 305 U. S. 297.

Petitioner's claim in this case embraces the contention that a corporation organized pursuant to a plan of reorganization approved in a statutory proceeding before a court of competent jurisdiction cannot print or distribute copies of the plan of reorganization for the information and use of its policyholders, creditors and other parties in interest (Petitioner's brief, p. 24). Certainly that result is not within the purview of the copyright laws. The respondent was bound to inform the persons who became its policyholders and creditors of their rights under the plan.

Since the plan was promulgated not by the respondent, but by the Insurance Commissioner of California, as statutory conservator of a predecessor company, if the petitioner ever had a cause of action it did not lie against the respondent but against the Insurance Commissioner of California.

## VII.

### **The Decision of the Circuit Court of Appeals Is Not in Conflict With the Decision of Any Other Circuit Court of Appeals on the Same Matter.**

Petitioner urges the court to review the decision below on the theory that there is a conflict of authority between two circuit courts of appeal upon the same legal proposition (Petitioner's brief, pp. 2, 14-16). No such conflict has been shown, however, and none exists.

The memorandum decision of the District Court expressed the specific opinion that there had been no sub-

stantial use of petitioner's means of expression and, accordingly, no infringement had occurred (Tr. 131). The decision of the Circuit Court of Appeals, affirming the District Court, stated (Tr. 176; 140 F. (2d) at page 184):

"We have compared the documents and are of the opinion that there is a substantial difference in defendant's language, sufficiently so to escape the charge of infringement."

From this language and from the decision which it affirmed it is clear that the decision of the Circuit Court of Appeals is grounded upon the finding that there has been no infringement because there is no substantial similarity between the means of expression in the alleged infringing works and the means of expression in petitioner's pamphlets. Petitioner has not and cannot produce any decision from any other circuit court of appeals in conflict with the basic principle there applied.

The opinion of the Circuit Court of Appeals also contains a discussion of the scope, if any, of the protection which petitioner obtained by filing his plans of reorganization in the Copyright Office. The opinion expresses the view that since a plan or system is not, as such, subject to copyright, the words used in expounding a plan or system should likewise not receive protection from the copyright law, for to give the words alone protection would permit the use of an admittedly usable plan or system only by evasive changes of language.

While that discussion does not constitute the decision of the court, the petitioner has apparently based his claim of conflict upon it.

Petitioner's efforts to find a conflict of decisions fail for at least three reasons.

In the first place, none of the three cases cited by petitioner (Petitioner's brief, pp. 14-16) establishes any

conflict whatever with the view expressed in the opinion below. None of the three cases dealt with a non-copyrightable subject such as a plan or system. In one case the copyrighted material was an advertisement (*Ansehl v. Puritan Pharmaceutical Co.*, 61 F. (2d) 131, C. C. A. 8th). Another dealt with a telegraphic code compilation (*Hartfield v. Peterson*, 91 F. (2d) 998, C. C. A. 2nd). The third dealt with catalogs (*R. R. Donnelley & Sons Co. v. Haber*, 43 Fed. Supp. 456). Each of these is admittedly a proper subject of copyright in itself, and none of the cases cited by petitioner has any bearing upon the scope of the protection, if any, obtained by filing a noncopyrightable plan or system in the Copyright Office.

In the second place, the views expressed in the opinion below were founded directly upon, and are in accord with, the decision of this court in *Baker v. Selden*, 101 U. S. 99. In the absence of a showing that the *Baker* case has been overruled by this court, there can be no doubt as to the applicable final authority.

Thirdly, the discussion of the scope of petitioner's protection, if any, was not necessary to the decision in the case and, therefore, constituted dicta. This the court itself recognized when it said (Tr. 176; 140 F. (2d) at page 184):

"It may be that we have gone further than necessary in denying plaintiff's claim as to infringement. This is so for the reason that defendant's alleged infringing material is not an exact copy of plaintiff's copyrighted pamphlets."

Since the views expressed were dicta they could not be the basis of a conflict of decisions even if contrary views of other circuit courts of appeals could be produced and even if the court below could be said to have misinterpreted the decision of this court in *Baker v. Selden*.

Disregarding, however, the fact that petitioner's ma-

terial constitutes a plan which, as such, is not copyrightable, and disregarding the view that the copyright laws may afford no protection at all to the words used in a plan which is not in itself the subject of copyright, the decisions are unanimous in holding that there can be no infringement where there has been no substantial copying or use of means of expression.

On that fundamental proposition of copyright law the decision of the court below was grounded. On that fundamental proposition no conflict of decisions has been, or can be, suggested.

#### **Conclusion.**

Neither the petition nor the brief in support thereof states any reason for a review of the decision of the Circuit Court of Appeals. A comparison of the exhibits in this case conclusively establishes that the alleged infringing works are not copies, in whole or in part, of any of the petitioner's pamphlets. The question of infringement was correctly decided by the Circuit Court of Appeals, and the decision is not in conflict with the decision of any other circuit court of appeals on the same subject matter.

The writ of certiorari should be denied.

Respectfully submitted,

ORVILLE J. TAYLOR,  
WHITNEY CAMPBELL,

*Counsel for Pacific Mutual  
Life Insurance Company,  
Respondent.*

